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*Attorneys for Intervenor-Defendant
Donlin Gold LLC*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ORUTSARARMIUT NATIVE COUNCIL,
et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, *et al.*,

Defendants,

and

DONLIN GOLD LLC, *et al.*

Intervenor-Defendants.

No. 3:23-cv-00071-SLG

INTERVENOR-DEFENDANTS' JOINT MOTION FOR RECONSIDERATION

Intervenor-Defendants respectfully request that the Court reconsider the scheduling order issued in this case on October 10, 2023 (ECF No. 47). As Plaintiffs noted in their motion (ECF No. 46), Intervenor-Defendants opposed the motion because the proposed schedule did not provide Intervenor-Defendants the opportunity to file a reply to Plaintiffs' opposition to Intervenor-Defendants' anticipated cross-motions for summary judgment. Indeed, Intervenor-Defendants were in the process of drafting their joint alternative scheduling motion when the Court issued its scheduling order. The Court's order stated that "at least on the current record it is unclear why" Intervenor-Defendants should have a reply brief. Through this motion, Intervenor-Defendants seek to provide that "why," correct several misrepresentations of Intervenor-Defendants' position in Plaintiffs' motion, and request an alternative scheduling order that is similar in most respects to Plaintiffs' proposal, but that allows for reply briefs from Federal Defendants and Intervenor-Defendants.

Contrary to Plaintiffs' assertions in their motion, Intervenor-Defendants clearly articulated the reasoning for their proposed schedule. Plaintiffs dismissed the proposal out-of-hand and instead of furthering discussions between the Parties, as was requested by all Intervenor-Defendants, Plaintiffs filed their scheduling motion. The three reasons shared with Plaintiffs are as follows.

First, Intervenor-Defendants view this case as being appropriate for disposition through the standard briefing process for cross-motions for summary judgment, and not under Local Rule 16.3's presumptive briefing schedule specific to administrative agency

appeals. In their motion, Plaintiffs mischaracterize the alternative schedule suggested by Intervenor-Defendants as providing an “extra” reply brief. Simply put, the “extra” reply is the standard reply brief afforded cross-movants for summary judgment. Here, as explained to Plaintiffs, Intervenor-Defendants each intend to cross-move for summary judgment and anticipate offering affirmative arguments that are independent of those offered by Plaintiffs. In such a case, Plaintiffs, Federal Defendants, and Intervenor-Defendants should all have the same opportunity to file a reply to the relevant oppositions to their motions for summary judgment.

Second, Local Rule 16.3(c) sets out a presumption for briefing schedules that may be modified by the court. Indeed, this Court has done so in at least two recent administrative agency appeal cases in which the Parties filed cross-motions for summary judgment. *See, e.g.*, Order re Joint Motion for Vacatur of the April 18, 2023, Case Scheduling Order [DKT.11] and Granting Stipulated Motion for Briefing Schedule, *Alaska v. Newland*, No. 3:23-cv-00007-SLG (D. Alaska May 9, 2023), ECF No. 13; Order Regarding Schedule and Page Limits for Summary Judgment Briefing, *Alaska v. Haaland*, No. 3:17-cv-00013-SLG (D. Alaska July 18, 2019), ECF No. 158.

Third, providing Federal Defendants and Intervenor-Defendants with a reply brief is appropriate here given the significance and complexity of this case. This case involves a project that, as acknowledged by Plaintiffs, is uniquely complex given the scale of the operation. *See* Pls.’ First Am. Compl. ¶ 3 (ECF No. 24). It is also very complex given the extent of agency review. The Donlin project has already been subjected to extensive administrative appeals before the State agencies and subsequent litigation in the State

courts. More to the point, it is anticipated that this case will involve an expansive administrative record. *See* Federal Defs.’ Second Unopposed Mot. to Extend Deadline to File Admin. R. 2 (ECF No. 44) (“Federal Defendants have compiled an administrative record that currently consists of approximately 70,000 individual electronic files”). Further, the claims raised by Plaintiffs involve fact-specific technical issues—the full briefing of which will greatly benefit this Court’s review. Intervenor-Defendants believe these are more than “suitable reason[s]” to permit the filing of reply briefs, which will result in only a modest extension to the schedule.

Accordingly, the Intervenor-Defendants propose modifying the Court’s scheduling order insofar as it provides deadlines for briefing on the merits (no modifications to the schedule for producing or challenging the record are requested):

- a. Plaintiffs shall file their motion for summary judgment by: **February 16, 2024 (or 45 days after a ruling on motions to supplement or complete the administrative record).**
- b. Federal Defendants shall file their cross-motion for summary judgment and opposition to Plaintiffs’ motion for summary judgment by: **April 2, 2024 (or 45 days after Plaintiffs’ opening brief).**
- c. Intervenor-Defendants shall file their cross-motions for summary judgment and oppositions to Plaintiffs’ motion for summary judgment by: **April 16, 2024 (or 14 days after Federal Defendants’ cross-motion and opposition brief).**
- d. Plaintiffs shall file their reply in support of their motion for summary judgment and opposition to Federal Defendants’ and Intervenor-Defendants’ cross-motions

for summary judgment by: **May 7, 2024 (or 21 days after Intervenor-Defendants' cross-motions and opposition briefs).**

- e. Federal Defendants and Intervenor-Defendants shall file their replies in support of their cross-motions for summary judgment by: **May 28, 2024 (or 21 days after Plaintiffs' reply brief).**
- f. Federal Defendants and Intervenor-Defendants shall provide Plaintiffs with a list of citations for inclusion in the joint appendix by: **June 4, 2024 (or 7 days after Intervenor-Defendants' reply briefs).**
- g. Plaintiffs shall circulate a draft of the joint appendix to Federal Defendants and Intervenor-Defendants by: **June 11, 2024 (or 7 days after Plaintiffs provide a list of citations for inclusion in the joint appendix).**
- h. Federal Defendants and Intervenor-Defendants shall provide any edits to the joint appendix to Plaintiffs by: **June 17, 2024 (or 6 days after Plaintiffs circulate the draft joint appendix).**
- i. Plaintiffs shall file the joint appendix: **June 19, 2024 (or 22 days after Federal Defendants' and Intervenor-Defendants' reply briefs).**

For the reasons articulated above and shared with Plaintiffs during our attempts to reach agreement and to enable us to adequately protect our interests as Parties to this case, Intervenor-Defendants respectfully request that the Court modify the scheduling order to provide the opportunity for replies supporting Intervenor-Defendants' cross-motions for summary judgment.

Respectfully submitted this 12th day of October, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 12, 2023, I filed the foregoing document electronically through the CM/ECF system, which caused all Parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Allison B. Rumsey
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